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# REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (1996)

## Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-first session prepared by the Secretariat

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## INTRODUCTION

1. At its fifty-first session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 20 September 1996, to include in the agenda of the session the item entitled "Report of the International Law Commission on the work of its forty-eighth session"[1] and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 31st to 41st, 48th and 49th meetings, held from 4 to 8 and 11 to 15 and on 27 November 1996. The Chairman of the International Law Commission at its forty-eighth session, Mr. Ahmed Mahiou, introduced the report of the Commission: chapters I and II at the 31st meeting, on 4 November; chapter III at the 34th meeting, on 7 November; chapters IV, V and VI at the 37th meeting, on 11 November; and chapter VII at the 40th meeting, on 14 November. At its 48th meeting, on 27 November 1996, the Sixth Committee adopted draft resolution A/C.6/51/L.17, entitled "Report of the International Law Commission on the work of its forty-eighth session". The draft resolution was adopted by the General Assembly at its 85th meeting, on 16 December 1996, as resolution 51/160.

3. By paragraph 17 of resolution 51/160, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the Commission's report at the fifty-first session of the Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document consists of five sections: A. State responsibility; B. State succession and its impact on the nationality of natural and legal persons; C. International liability for injurious consequences arising out of acts not prohibited by international law; D. Reservations to treaties; and E. General conclusions and recommendations.

## TOPICAL SUMMARY

### A. STATE RESPONSIBILITY

[See A/CN.4/479/Add.1]

### B. STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

#### 1. General observations

5. The Commission's work on the topic was generally welcomed. It was pointed out that the subject involved an analysis of the respective roles of national

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[1] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 and corrigendum (A/51/10 and Corr.1).

and international law with regard to nationality. While the primary role of the former was recognized, it was stressed that international law imposed certain restrictions on the freedom of action of States, particularly in the area of human rights. While views differed as to the existence, at the current stage, of a general right to nationality under international law, the importance of avoiding statelessness was emphasized.

6. As to the working methods, it was observed that the Commission should adopt a flexible approach involving both codification and progressive development of international law. The point was made however that it was important to distinguish clearly between lex lata and lex ferenda in this field.

7. The view was expressed that one of the basic objectives of the Commission should be to formulate a comprehensive inventory of State practice from all regions of the world. It was felt that the Commission should restrict the content of the topic to a minimum and not take up matters which did not need to be regulated.

8. Reference was made to the Declaration recently adopted by the European Commission for Democracy through Law (Venice Commission) on the consequences of State succession for the nationality of natural persons. The remark was made that that document could provide useful guidance to the International Law Commission. In this context, emphasis was placed, more generally, on the importance of closer coordination among international bodies dealing with identical issues.

### 2. Approach in addressing the two aspects of the topic

9. Most representatives agreed with the Commission's proposed approach to separate consideration of the question of the nationality of natural persons from that of the nationality of legal persons and to give priority to the former, which, it was argued, involved human rights, while the latter raised problems of an economic order.

10. The view was expressed however that the question of the nationality of legal persons also gave rise to a number of important problems that must be addressed. It was also observed that, in some cases of State succession, the nationality of legal persons might affect the property rights of individuals and thus human rights as well.

### 3. Outcome of the work on the topic of the nationality of natural persons

11. Many representatives expressed support for the Commission's preliminary suggestion that the result of the work on the topic of the nationality of natural persons should take the form of a declaration of the General Assembly consisting of articles with commentaries. In this respect, the point was made that such non-binding instruments had a certain legalizing effect since an action in conformity with them enjoyed the presumption of lawfulness; that experience had demonstrated their impact on relations among States; and that the

International Court of Justice had resorted to declarations as evidence of the opinio juris of the community of States.

12. There was also the view, however, that it was premature to decide at the current stage on the final outcome of the work. Some representatives, moreover, favoured the elaboration of a binding instrument, which was considered more appropriate if the intention was to elaborate obligations of States or lay down rules on specific situations regarding State succession rather than set out general principles.

### 4. Comments on the Working Group's proposals concerning a possible future instrument on the nationality of natural persons in situations of State succession[2]

13. Support was expressed for the Working Group's proposal that the future instrument should be divided into two parts, the first containing general principles concerning nationality in all situations of State succession, and the second containing rules on specific situations of State succession. In connection with the latter, it was considered appropriate to retain the categories which the Commission had adopted for the codification of the law of succession in respect of matters other than treaties, rather than those which it had adopted for succession in respect of treaties.

14. As regards the right to the nationality of one of the successor States, it was felt essential that the instrument should provide for the right of every national of the predecessor State to the nationality of a least one of the successor States. Attention was drawn to the fact that the Declaration of the Venice Commission embodied the rule that, in all cases of succession, the successor State must grant its nationality to nationals of the predecessor State residing permanently in the territory affected by the succession, a rule which was considered to be in conformity with State practice and with general international law. It was further noted that, under the terms of the Declaration, it was desirable for the successor State to grant its nationality to persons originating from the territory in question who were nationals of the predecessor State and who, at the time of succession, were not resident in that territory, and to permanent residents of such territory who, at the time of succession, had the nationality of a third State.

15. It was considered crucial that the future instrument place emphasis on the obligation of States to avoid statelessness. It was noted that the Declaration of the Venice Commission provided that the successor State must grant its nationality to any persons, whether permanent residents of the territory concerned or persons originating from that territory, who would become stateless as a result of succession, and must not withdraw its nationality from its own nationals who have been unable to acquire the nationality of a successor State.

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[2] One delegation submitted written comments on this issue, which are available to the members of the Commission upon request.

16. The view was expressed that a right of option existed under customary international law. However, it was also held that there was no general obligation on the part of States to grant a right of option to individuals in cases of State succession, nor was there a legal basis for an individual to opt for a second or third nationality. It was suggested that the time period during which a right of option could be exercised should not be shorter than five years from the date of the promulgation of relevant legislation. It was observed that the Declaration of the Venice Commission contained detailed provisions on the right of option and also included a new rule which, however, was in conformity with international standards of human rights, providing that the exercise of the right of option must have no prejudicial consequences for the persons concerned, particularly with regard to their right to residence in the successor State and their movable or immovable property located therein.

17. Support was expressed for the inclusion, in clearly drafted terms, of the principle of non-discrimination on the basis of ethnic, religious, linguistic or other similar grounds. It was pointed out that the Declaration of the Venice Commission also contained provisions on non-discrimination.

18. The importance of the principle of prohibition of arbitrary decisions was emphasized.

19. Support was expressed for the inclusion of a provision ensuring access to administrative or judicial procedures and timely issuance of relevant decisions.

20. The view was expressed that measures should be taken to ensure that members of a family would have the same nationality. It was suggested to use, in the future provision on the unity of families, the expression "necessary measures" rather than the phrase "reasonable measures".

21. While the importance of the obligation to consult and negotiate in order to resolve any potential problems which may arise as a consequence of State succession was recognized, attention was drawn to the fact that such process could be very lengthy and that, in the meantime, statelessness on a massive scale could ensue.

22. The point was made that only an affected or injured State would be entitled to raise the issue of non-compliance by another State of a provision embodying obligations of one State vis-à-vis other States. The view was further expressed that, if norms were cast in terms of human rights provisions directly invocable by an individual against the State, they would be ineffective unless an enforcement mechanism was provided; in the absence of such a mechanism, the rules would therefore need to be formulated so as to make them applicable in inter-State relations.

## C. INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

### 1. General approach to the topic

23. Many representatives noted that the topic involved mainly activities typical of modern industrial societies, such as those connected with nuclear power plants, the chemical and space industries and maritime transport of petroleum and other dangerous or polluting substances, which certainly had undeniable political and economic value, but also posed a considerable risk for the safety of human beings and protection of the environment. Such activities, whether conducted on land, or on ships, aircraft or space objects, could cause harm in other States or in areas which were not under the jurisdiction of any State in particular. It was agreed that although States were free to carry out or permit dangerous activities in their territory or other areas under their jurisdiction, the question remained as to whether they should be responsible for harm caused to other States or common areas in such cases.

24. It was noted that at the time when the Commission had included the topic in its programme of work, some of its members and some members of the Sixth Committee had thought it was presumptuous to venture into an area where many States considered that they had absolute freedom of action. But that position was no longer defensible in the light of what the International Court of Justice had said in paragraph 29 of its 1996 advisory opinion on the legality of the threat or use of nuclear weapons, to the effect that the general obligation of States to ensure that activities within their jurisdiction and control respected the environment of other States or of areas beyond national control was now part of the corpus of international law relating to the environment. It was further noted that the trend in international law in the area under consideration would seem to indicate that a general rule had developed which required States to avoid harm or the risk of harm as a result of the activities in question. In this regard, reference was made to principle 21 adopted at the United Nations Conference on the Human Environment, held at Stockholm in 1972, and reaffirmed in many General Assembly resolutions and principles 2 and 13 of the Rio Declaration on Environment and Development.

25. The remark was made that the task of regulating the potentially detrimental external effects of intensive industrial activities not prohibited by international law and finding a balance between the profits derived from such activities and the burden caused to third parties could be achieved in various ways, such as through the polluter-pays principle, which was not applicable in all cases, or through a regime of civil or State liability or through a combination of both.

26. Some delegations attached priority to the topic of international liability for injurious consequences arising out of acts not prohibited by international law and commended the Working Group on its report. They considered that the report of the Working Group provided a good basis for further work by the Drafting Committee. They shared the view that there were essentially two elements to be taken into account: the prevention, in the broadest sense of the term, of transboundary harm arising from activities not prohibited by international law, and compensation for transboundary harm. The Working Group

had rightly assumed, it was felt, that there was nothing to prevent a State from engaging in activities not prohibited by international law, even if such activities could cause harm beyond national frontiers, but that its liability might be triggered even if the activities were characterized as lawful. It was noted, however, that in some instances, points mentioned only in the commentary should be brought into the text of the articles while, in others, additional articles were required.

27. It was noted that a fundamental flaw that had impeded progress on the topic since its inception was the question of its theoretical basis and its relationship to State responsibility. It was felt that the fact that certain activities were not prohibited by international law was irrelevant to the question of liability and compensation. Most activities that caused harm were not illegal. In order to eliminate some of the conceptual confusion, it was proposed that the title of the topic should be changed to something like "The prevention of and compensation for transboundary harm".

28. Some other representatives, however, expressed reservations about the Commission's work on the topic. They urged the Commission to take the concerns of Governments into account in the planning of its future work. They noted that in seeking to fuse concepts of environmental impact assessment and liability the Commission had raised difficult issues. Moreover, existing agreements showed the need for liability regimes closely tailored to particular activities. They considered that it was not feasible or even necessarily desirable to establish a single regime for all cases, and certainly not a binding one. They felt that the draft articles would obligate States to establish an environmental impact assessment process for virtually all activities which might cause significant transboundary harm and they implied State liability for all such harm. In their view the Commission should narrow its focus and limit the topic to particularly hazardous activities, and any regime in this area should promote international cooperation and negotiation rather than impose binding obligations to assess risks and provide compensation or other relief.

### 2. Scope of the topic

29. As regards the scope of the topic, it was noted that the basic issue was one of reconciling the right of a State to engage in lawful activities and the right of a State to enjoy its facilities without disruption resulting from the activities of another State. To reconcile those rights required the application of the principle sic utere tuo ut alienum non laedas, which inevitably led to measures to prevent harm and to liability where harm occurred. Many delegations expressed satisfaction with the approach reflected in the draft articles and regarded them as an adequate basis for further work.

30. Some representatives felt that the Working Group had rightly chosen not to draw up a list of activities involving a risk of transboundary harm, as it was impossible to foresee all activities which might involve a risk in the future. Any such list would run the risk of being incomplete and would have to be updated regularly, given scientific and technological progress which increased the risk of transboundary harm. In addition, except in the case of some specific activities, the risks and harm which might arise from an activity

depended basically on the manner in which it was carried out and its context. The view was expressed, however, that it would be useful to include a merely illustrative list in article 1, for it would then be easier to oblige States to take preventive measures with regard to the listed activities and substances.

31. As regards article 1, some representatives stated that activities other than those involving a risk of causing significant transboundary harm should be included, for otherwise the possibility of relief for third-party damage caused by industrial emissions or exhaustion from combustion engines, for example, would be excluded. The comment was also made that although it might seem onerous to impose liability on States for activities with unforeseen consequences, it would be more unjust to leave innocent States to bear the losses alone. Moreover, to impose liability for unexpected losses, it was felt, would provide an incentive for States to be particularly vigilant, and the foreseeability of risk was factored into the draft articles as an element to be considered in negotiations for compensation. In that connection, it was noted that the obligations with respect to prevention contained in chapter II of the draft articles should not be applied to activities under article 1 (b), but the obligations with respect to compensation contained in chapter III should be applied to them.

32. Some other delegations felt that the scope of the draft articles should not be broadened: article 1 (a) was already too broad. To impose liability (article 5) for all legal activities which involved any risks of significant transboundary harm made the proposal unmanageable; any extension of the regime was beyond contemplation. If the topic was limited to particularly hazardous activities, it might be useful to produce a merely illustrative list of such activities. An additional problem was that article 1 (a) did not define "activity"; the text would seem to apply even to legitimate economic or development policies. Furthermore, article 2 (b) defined "transboundary harm" essentially without limits; the formulation should be limited to physical and attendant economic harm.

33. It was also noted that article 1 had failed to define the term "significant transboundary harm", which was pivotal to the whole regime. That omission was considered by some delegations all the more significant because article 21 referred merely to negotiations, making no provision for mandatory judicial settlement of claims. In that connection, paragraph (4) of the commentary to article 2 was considered neither a substitute for a prescription, nor helpful for operational determination. In the event that a definition was unattainable, provision should be made for a procedure which went further than mere negotiations.

34. As to whether the scope of the draft articles should be expanded, the view was also expressed that the main point was that the injured parties must be able to obtain compensation or other relief, regardless of whether the activity had involved a risk of causing harm. The consequences of the harm must be compensated, and the State in whose territory the harm originated must assume its responsibility in accordance with the principle that a State was responsible for activities occurring in its territory and affecting other States. That did not rule out the civil liability of individuals. It was further stated that the

liability of a State would be increased if it had not taken or had violated preventive measures.

35. As regards article 2, it was stated that the definitions in subparagraphs (a) and (b) posed no problems, but created a possible overlap between the criteria of territory, jurisdiction and control in subparagraphs (c) and (d), which it would be difficult for an instrument of the current type to resolve. It was also stated that jurisdictional control or sovereignty over a territory did not per se constitute a basis for international liability of States, for what was crucial was the actual control of operations taking place within the territory of a State.

36. Article 3 was considered, by some representatives, a fundamental provision which recognized the limitations on a State's freedom of action, and its precise formulation must be approached with extreme care.

37. Article 4 was also viewed as a statement of principle, and must therefore be carefully formulated. It was noted that paragraph (1) of the commentary to article 4 spoke of preventing or minimizing harm, whereas the article provided primarily for preventing or minimizing risk; also, the term "due diligence" appeared in paragraph (4) of the commentary to article 4, but did not appear in the articles. It was also suggested that the basis for the obligations contained in chapter II could be strengthened by replacing "appropriate" with "possible" in article 4. Article 4 was also endorsed because it provided that all States must take appropriate measures to prevent or minimize the risk of transboundary harm. That was considered an obligation of "due diligence", in accordance with State practice and international jurisprudence.

38. The inclusion of draft article 5 was welcomed. It was stated that in draft article 5, on liability for transboundary harm, it would have been preferable to state the principle of compensation with greater clarity and precision. That article should be coordinated with the articles in chapter III, which stipulated that compensation for harm should be subject to negotiations between the State of origin and the affected State, in accordance with the principle that the victim of harm should not be left to bear the entire loss. That view, it was stated, resulted from an overly limited conception of liability for lawful acts, which should be modified in the context of chapter III of the draft as well. It was stated that article 5, on liability, needed to be more precise and that it should be made clear in the text that not only persons and property but also the environment were protected. In addition, it was noted that it was unclear from the text what exactly compensation was due for; as a minimum, compensation should be given for costs incurred.

39. The principle of cooperation laid down in draft article 6 was considered essential for determining the best way to prevent or minimize the risk of causing significant transboundary harm. It was considered prudent to enlist the aid of international organizations, which were the ideal forum for reconciling the conflicting interests of States, as long as their intervention did not present an obstacle to risk prevention and reduction. Some delegations also felt that article 6 could be clarified by making explicit the duty of notification in cases where harm had occurred, even though that was implied in the duty to cooperate in good faith.

40. As regards article 7, it was noted that it would benefit from a provision to the effect that States must ensure that effective recourse was available in national courts; as it stood, there was no clear duty to do so.

41. In general, articles 9 to 19 were considered in keeping with international practice as reflected in treaties and in the pronouncements of international organizations and other non-binding international instruments. It was agreed that the obligation of prevention gave rise to consequences relating principally to the extent of compensation. The principle of liability for lawful acts must be kept separate from that of liability for unlawful acts, which was the result of a violation of the primary rule.

42. It was suggested that there should be a separate article on monitoring and that article 9 should explicitly state that States must not authorize activities involving a risk of transboundary damage unless measures were taken to prevent such damage from occurring. In this regard, it was stated that the commentary was more clear and precise than the article itself.

43. The comment was made that the "assessment" required by article 10 should be replaced by the more specific "environmental impact assessment", prescribed in principle 17 of the Rio Declaration on Environment and Development and now an accepted concept in international environmental law.

44. Some delegations felt that article 13 should clarify that, where an assessment indicated a risk, notification should be provided before authorization was given according to articles 9 and 10.

45. The qualifier "whenever possible and by such means as are appropriate" in article 15 was found too vague. Also, in order to ensure that the information provided was the same as that given to potentially affected States, it was proposed that the article should use the same wording as article 13, and refer to "available technical and other relevant information on which the assessment is based".

46. While it was agreed that it was important to protect information which was vital to national security or industrial secrecy, it was also suggested that article 16 should reflect the element of proportionality, particularly when the harm originated in the business whose secrets were being protected.

47. Article 17 was considered to a large extent to be a codification of certain basic principles of good-neighbourliness. Paragraph 3 of the article, it was noted, made it clear that completing consultations did not free the State of origin from liability and that it was obliged to take into account the interests of the affected State. Therefore, it was felt that a more comprehensive duty to settle disputes through a third party ought to be considered, especially as the procedure in the domestic courts of the State of origin, discussed in the general commentary to chapter III, was not explicitly evoked in the text.

### 3. Approach to liability and compensation

48. Some representatives considered the approach taken to the issue of compensation or other relief in chapter III of the draft to be in the right direction. They warned, however, against terminological confusion. They stated that they were prepared to accept the exclusion of "absolute liability" or even "strict liability", as indicated in paragraph (1) of the general commentary to the chapter, provided that it was accepted that no-fault liability was not also excluded. In their view, there would, after all, be no basis for compensation if there were no provisions for no-fault liability. They also felt that an effort might be made to go a little further with respect to the obligation to negotiate by including requirements to conclude an agreement with the affected State or individuals and to make effective compensation, on the assumption that at a later stage a dispute-settlement mechanism would be provided in order to enforce the obligation. A reservation was expressed with the language in the commentary to article 21 to the effect that the principle that the victim of harm should not be left to bear the entire loss, implied that compensation or other relief might not always be full. That so-called principle could be used as a pretext to victimize neighbouring States by carrying out activities which caused significant transboundary harm.

49. It noted that one important issue in this chapter of the articles was whether compensation was due even if the State of origin had diligently attempted to prevent transboundary harm. Draft article 22 (b) seemed to suggest that an important factor in compensation negotiations was the extent to which due diligence was exercised; that implied that there was an obligation of due diligence to prevent harm, and not an absolute obligation to prevent it. In this connection it was noted that a due diligence standard was not appropriate for all activities that might cause significant transboundary harm, as there were certain ultra-hazardous activities that might demand a strict liability standard. The use of the phrase "due diligence" would seem to entrench unnecessarily a standard of liability that was subject to development in the international legal regime - for example, as environmental crises became more acute - leading to a stricter approach to liability, and could be replaced by "all appropriate measures" (see also para. 31 above).

50. Some other representatives, however, were of the view that the liability regime should not be extended to address compensation and other relief with regard to States which did not take preventive measures. It would go too far, in their view, to require States to provide compensation for all sorts of significant transboundary harm. It was going even further to propose State responsibility for violation of preventive measures.

51. The view was also expressed that the liability of the State could be conceived only residually vis-à-vis the liability of the operator of the activity at the origin of the transboundary harm. Recognition of the residual liability of States for harm caused by lawful activities would itself constitute a very considerable development of international law. States would be unlikely to accept such a development in a general form. To date, they had accepted it only in specific treaties such as the Convention on International Liability for Damage Caused by Space Objects of 1972. There, however, the States originating the Convention had considered space activities as activities reserved

exclusively to States, which would clearly not be the case for all the activities envisaged in the draft articles under consideration. It would therefore be preferable to make the draft articles a sort of compendium of principles, to which States could refer when establishing specific regimes of liability. That would be a realistic, pragmatic and constructive approach to the topic.

52. The definition of "compensation or other relief" in article 5 was found ambiguous, for it left open the question of precisely who or what was liable. If the draft articles were meant to be the basis of a treaty, it might be assumed that they imposed obligations only on States and not on private entities. It was noted that under customary international law States were not generally liable for transboundary harm caused by private entities. In the view of these delegations, the best way to minimize such harm was to assign the costs to the person or entity causing it and not to the State.

53. One view did not agree with the language in the commentary to draft article 22 that the Commission considered that the obligations to prevent transboundary harm were not "hard" obligations and that their breach did not entail State responsibility. According to this view the articles on prevention were important in distinguishing the liability topic from the articles on State responsibility. However, the obligation of prevention was a primary rule and once that rule was breached the realm of secondary rules was entered, which meant State responsibility. It was pointed out that the obligation of prevention was not an innovation, but a general principle of law deeply rooted in the international system. Thus, according to this view, the obligation to prevent transboundary harm was a long-standing "hard" obligation of positive international law, and a breach of such an obligation would entail State responsibility.

54. As regards the two alternative procedures for pursuing remedies, some delegations were of the view that they should be left open. For it might sometimes be appropriate for victims to seek redress through the systems of the State of origin; in other circumstances State-to-State negotiations might be best.

55. It was stated that article 20 was a standard provision prohibiting discrimination, but it prescribed no duty for States to ensure a right of redress, nor even a right of access to effective national forums; that omission should be remedied.

56. It was felt that the provision in article 21 that compensation should be negotiated "in accordance with the principle that the victim of harm should not be left to bear the entire loss" seemed at odds with the natural presumption that the polluter should pay the entire loss, in the absence of circumstances warranting an adjustment. Furthermore, the dispute settlement obligation was very weak, which was a serious shortcoming that could be rectified, for example, by compulsory reference to the International Court of Justice or arbitration.

57. It was also stated that the duty of compensation arising out of such liability could be performed directly by the operator or by means of a two- or three-tier system based on the establishment of a compensation fund and another

means. However, only articles 5 and 21 of the current draft were devoted to the codification of international liability. Moreover, the text contained no provisions concerning the nature of the liability or the measure of compensation and also failed to make any distinction between the concepts of responsibility and liability.

58. The comment was made that the availability of compensation through a specific international treaty should be another factor included in draft article 22. Where exhaustive compensation regimes were provided, there was no need for further State compensation. Besides, many of the compensation and liability regimes contained provisions which ruled out further action if compensation was payable under a specific regime.

59. Subparagraphs (a), (b) and (c) of article 22 seemed, to some representatives, to undermine the concept of liability for lawful acts. In particular, if subparagraphs (a) or (b) were retained, there would appear to be a breach of obligation, in which case there was a duty of reparation that went further than the liability envisaged in the draft articles. Subparagraphs (d) to (j) seemed reasonable when taken one at a time, but together they seemed to erode the "polluter pays" principle. It was also felt that it might be useful to include in article 22 a reference to the means by which the State of origin had notified the risk of significant transboundary harm, for that factor might affect the degree of liability.

### 4. Future work on the topic

60. A number of representatives endorsed the Commission's view that the Working Group's report represented a substantial advance and they urged the Commission to proceed with its work towards the codification and progressive development of what was a separate field of international law. The remark was made that the distinction so clearly identified by the Working Group would not be blurred at all by the adoption of articles comprising residual rules which imposed obligations on States without affecting the lawfulness of the activities they were concerned with.

61. Some representatives felt that the future work should be focused on areas which had some chance of commanding consensus, with a view to producing a set of recommended principles for practices rather than a multilateral convention.

62. The view was also expressed that the Commission should approach the draft articles as a text concerning an environmental protection regime rather than international liability. If the Commission decided to pursue its current approach to the text, it was suggested that it should concentrate on formulating a few basic principles governing an environmental protection regime with a view to their adoption as a non-binding instrument by the General Assembly, a procedure in keeping with article 23, paragraph 1 (b), of the Commission's statute. According to this view, it would be a futile and time-consuming exercise to draft detailed articles that were intended to serve as the basis for a convention.

63. It was also stated that it was too early to decide whether to aim at a convention or a less ambitious non-binding instrument.

64. A view was also expressed that the topic was devoid of substance. It dealt with sic utere tuo ut alienum non laedas, a substantive rule of customary international law the breach of which might entail liability according to the normal rules of State responsibility. According to this view the provisions on prevention, although useful, were not appropriate material for a code; the provisions on liability begged so many questions that the Sixth Committee could not support them even if there were no separate draft articles on State responsibility; and adding the cases tentatively mentioned in draft article 1 (b) would aggravate the situation even further. For these reasons, this view suggested that the Commission should cease considering the topic, given the burden it imposed on the Commission.

## D. RESERVATIONS TO TREATIES

### 1. General comments

65. A number of representatives stressed the proper balance struck by the Vienna regime between the necessity of allowing reservations, thus permitting the universality of international treaties, and the need to preserve the integrity of the treaty, and expressed their support for the preservation of this regime and the flexibility and adaptability it had introduced. It was generally agreed that the Commission should not destabilize a system that functioned in a satisfactory manner. It was noted that questioning the reservations regime established thereby would result in an excessive restriction on the admissibility of reservations and the free consent of the parties.

66. Many delegations endorsed the Special Rapporteur's conclusion that the Vienna system could be applied in a satisfactory and uniform manner to all treaties irrespective of their object and that there was no reason to favour a proliferation of regimes, depending on the object of legal instruments, i.e. normative or human rights treaties. The uniform and flexible regime of reservations concerned not only evaluation of the permissibility of reservations in the light of the object and purpose of the treaty, but also preservation of the freedom of other contracting parties to agree to reservations through a mechanism of acceptances and objections.

67. It was pointed out that the Special Rapporteur had provided a thoughtful analysis of whether reservations to treaties required a "normative diversification", referring particularly to the advisory opinion of the International Court of Justice on reservations to the Convention on Prevention and Punishment of the Crime of Genocide, which was a human rights treaty par excellence. One view found it useful to establish a special regime for reservations to human rights treaties whereas another thought that the right balance should be struck between the unitary character of the regime of reservations and the specificity of human rights instruments.

## 2. Nature and function of reservations

68. It was observed that reservations were a formal and legitimate means of formulating a State's consent to be bound by a treaty forming an integral part thereof. The view was also expressed that the right to formulate reservations was of a residual nature and that States should pay special attention to reservation provisions when negotiating multilateral treaties.

69. It was further observed that although the permissibility doctrine was in general preferable (as opposed to the opposability doctrine), in cases where reservations were too vaguely formulated, States should engage in a dialogue with the reserving State after raising a "preliminary objection", thus providing the latter with the opportunity to clarify subsequently its intention to fulfil its obligations in accordance with the object and purpose of the treaty. It was felt that such a procedure would enable the objecting State to reserve its position without being bound by acquiescence. It was further noted that reservations formed an integral part of the consent to be bound by a treaty and promoted wide acceptance by the international community of a number of treaties.

70. The remark was made that the validity of reservations could be assessed only in the light of the object and purpose of the treaties without reference to other, more subjective considerations. As regards the question of reservations to treaty provisions embodying customary rules, the view was expressed that it was very difficult to determine which international conventions represented rules of customary international law which could not be subject to reservations. Furthermore, the duty of a State to comply with a general customary principle should not be confused with its acceptance to be bound by its expression in the treaty. In any event, it was stressed that the concept of a customary rule was not synonymous with a "peremptory norm of international law" (jus cogens).

## 3. Role of treaty bodies with respect to reservations

71. As regards the role of treaty bodies with respect to reservations, two different views were expressed. According to one view supported by some representatives, treaty monitoring bodies, which had acquired great significance at both regional and international levels, should have the power to determine the permissibility of reservations, even if such power was not expressly vested in them by treaty provisions, as they could not properly fulfil their monitoring function without determining the exact scope of the obligations undertaken by a treaty party. In this context, a view was also expressed that monitoring bodies had competence to examine the significance of reservations insofar as it was necessary for their own work. Such competence for monitoring bodies was considered without prejudice to the competence of States freely to form their own judgement and to decide on reactions to reservations which they considered impermissible. It was suggested that, in cases where a treaty monitoring body determined that a reservation was null and void, it should give the reserving State the opportunity to withdraw or reformulate the reservation or even withdraw from the treaty. It was felt that in the latter instance it would be necessary to address the issue of whether the withdrawal would have effect ex nunc or ex tunc. The remark was also made that a new procedure could be

established whereby a State could reformulate its reservation in order to make it permissible or even make a new reservation after ratification.

72. According to another view shared by some other representatives, the monitoring bodies could not determine the permissibility of reservations or their compatibility with the object and purpose of the treaty, and they had no role in the matter. Their function was to monitor the implementation of the provisions of international instruments on the basis of the free consent of the parties and of the recognition that the parties exercised control over the work of those bodies. Therefore it was for the reserving State as well as for the objecting State to draw the conclusions with regard to the incompatibility of reservations with the object and purpose of a treaty and its effects unless the treaty provided otherwise.

### 4. Future organization of work

73. Several delegations stressed the usefulness of a guide to practice which could contribute to the clarification of many aspects in that unclear area of international law. Some representatives considered that such a guide was of great assistance to States and international organizations. It was felt that such a guide would serve to promote the ratification of multilateral treaties without undermining national legislation and would cover problems relating to other categories of State succession besides the case of a newly independent State.

74. As regards the draft resolution appended to the report, some representatives thought that it merited close attention and expressed support for the ideas contained therein. As regards the form, namely the form of a resolution, some representatives supported it while others found it unusual or premature. It was also proposed that the ideas and principles contained in the draft resolution should be submitted to the General Assembly in the form of recommendations or draft articles.

75. It was suggested that the Special Rapporteur should also consider the matter of clarifying the notion of "object and purpose of a treaty" as well as the criterion on which the permissibility of a reservation depended. It was noted that the practical difficulty which accompanied the principle was diverse State practice on what was the appropriate test to determine the incompatibility of a reservation with the object and purpose of a treaty. Accordingly the issue of impermissible reservations needed to be examined very closely. It was also suggested that dispute settlement mechanisms linked to the reservation regime should also be studied.

## E. GENERAL CONCLUSIONS AND RECOMMENDATIONS

### 1. Report of the Commission

76. With regard to the report of the Commission as a whole, the view was expressed that the report was of high quality and its content was well organized and easy to use. The hope was expressed that the Commission would continue to follow that direction in the preparation of its future reports.

77. While some representatives agreed with the suggestion that reports of the Commission should be shorter and more thematic, others did not find that suggestion convincing. Reducing the information and analysis in the interest of greater concision would not contribute to the debate in the Sixth Committee.

### 2. Future sessions of the Commission

78. Reference was made to the future sessions of the Commission. Some representatives expressed support for splitting the Commission's annual session into two parts, one to be held in New York and the other at Geneva. A 10-week split session was viewed as having the possibility of permitting better attendance by the members of the Commission. Some supported the suggestion to try to split the session in 1998.

79. Others expressed opposition to the splitting of the session and to holding the Commission's sessions anywhere but at Geneva. In their view, the proposed split session between New York and Geneva would be counter-productive, costly and pointless. They further felt that the financial arguments in favour of splitting the Commission's session into two parts, to be held in two different cities, was not found convincing or decisive. The determining factor, they felt, should be for members of the Commission to be enabled to work calmly and without interruption. A single session in Geneva, according to these representatives, met that objective. It was also pointed out that another determinant factor for the duration of the session should be the workload.

### 3. Distinction between codification and progressive development

80. Some representatives endorsed the Commission's conclusion that the distinction between codification and progressive development had lost most of its relevance and had proved unworkable. It was noted that while the Commission's statute envisaged two different procedures, codification and progressive development were not in fact watertight concepts.

81. It was further observed that, owing to the diminished distinction between the two concepts, there was a perceived need for a more comprehensive review of the codification process within the United Nations system. As the distinction was difficult to apply in practice, the Commission should in the future base its work on any given topic on international conventions and custom and the recognized principles of law and should then proceed to consider what contributions to progressive development might be acceptable to the international community.

82. The view was expressed that the Commission had rightly understood that its mandate was not limited to the mere compilation of existing law and had therefore undertaken an ongoing process of innovation, renewal and modernization of prevailing norms within the framework of the progressive development of international law. The two concepts, which were enshrined in the Charter of the United Nations, continued to evoke a fundamental difference between simply reviewing existing norms and taking the modernizing approach of choosing among the various alternatives for future norms.

83. The view was also expressed in this connection that it was necessary to bear in mind the fact that codification was a process designed to pin down the unique "right solution" which represented what the law was at a given moment. Progressive development, on the other hand, necessarily entailed an element of choice as to how the law should develop; various solutions were possible, none uniquely right. It was suggested that over the years, in omitting the distinction, the Commission had in fact been disguising that element of choice. It was considered that it would have been preferable for the Commission to acknowledge the element of choice, identify the choices and explain the criteria. That would not only make the entire process of choice and recommendation more transparent, but would also enable the Commission to point out to Governments the consequences of the various choices. Moreover, the Commission would be able to state its own preferences, which would facilitate the dialogue between the Sixth Committee and the Commission.

84. It was further stated that although it might be impossible to separate the two aspects, namely, codification and progressive development, nonetheless an attempt should be made to draw a clear distinction between those norms which comprised a current law (lex lata) and those which were formulated with a view to progressive development (de lege ferenda). Otherwise, the entire instrument would lose its value.

### 4. Relationship with the Sixth Committee

85. The view was expressed that it was of vital importance for States to view drafts prepared by the Commission not as something divorced from their day-to-day reality but as useful and necessary tools for enhancing that reality and improving their population's living conditions. Otherwise, the Commission's drafts would lack the government support necessary for their adoption at the national level. For that reason, it was considered important that channels of communication should be established between the Commission and Governments, since dialogue, coordination and consultation were the road to cooperation and to the establishment of legal norms that reflected common values shared by all members of the international community. The Commission's recommendation in this regard for enhancing its relationship with the Sixth Committee was endorsed. This might require the shortening of the time allotted to consideration of the Commission's report and to the general debate in order to permit an informal exchange of views on the principal problems and questions posed by the Commission's work.

86. The point was stressed that it was important to improve and strengthen the dialogue between the Sixth Committee and the Commission. The Commission needed to receive more guidelines for its work through the timely transmission of comments and information from States. In that context, the yearly consideration by the Sixth Committee of the report of the Commission was especially appropriate, and the availability of reports before the beginning of the session would facilitate that dialogue. For its part, the Commission should give greater emphasis to the comments received.

87. It was suggested that since the interrelationship between the Sixth Committee and the Commission was a vital component of the functioning of the

Commission which must be improved and rendered more effective, the input from the Sixth Committee should therefore be as constructive as possible, whether through responses to questionnaires, through written comments by Governments or through oral comments during the debates on the Commission's annual report. It was considered that the debate in the Sixth Committee should be more structured. Rather than making general statements, which were in any event then forwarded in writing to the Commission, it would be preferable to take advantage of the presence of the Chairman and the Special Rapporteurs of the Commission in order to engage in a more structured, dynamic and direct discussion with them. The Committee could also improve the structure of its discussion of the Commission's report, including resort to open-ended working groups on the various topics and the encouragement of formal statements which facilitated the understanding of the positions of States and the submission of position papers to accompany statements.

88. It was also stated that the Commission was entitled to be critical of the Sixth Committee's muffled and sometimes misleading responses of the past. It was necessary to decide whether the traditional debates in the Sixth Committee and the General Assembly resolutions to which they led provided the Commission with the dialogue it needed.

### 5. Role of special rapporteurs

89. Some representatives underscored the role of the special rapporteurs in the preparation of reports, in taking the lead in the Commissions's discussion of topics and the preparation of commentaries. They considered as most valuable the recommendation concerning the use of working groups to assist the special rapporteurs and to act in place of the Drafting Committee with a view to expediting the work. It was pointed out, however, that such a practice should not substitute for the practice of appointing special rapporteurs. That practice was considered to be a reasonable way of guiding the Commission's work on less urgent topics requiring the development of expertise over time.

90. The proposal that special rapporteurs provide commentaries to the draft articles proposed by them was viewed as imposing an unnecessary burden upon them. The proposal to request special rapporteurs to indicate at each session their plans for the next reports was also considered to be unrealistic since they normally could not know beforehand how their reports should be developed. The Commission could only expect an indication of the general thrust of future reports.

91. To expedite their work, a proposal was made that the special rapporteurs should be supported by assistance from the academic community and non-governmental institutions. They could also be invited to attend the debate in the Sixth Committee during the consideration of their topic, whenever the need arose, so as to answer questions about it.

## 6. Possible topics for future work

92. With regard to the selection of topics for the future work of the Commission, the view was expressed that such selection should reflect the needs of States and of the development of international relations. Since that was how it had generally functioned, the Commission had been able to elaborate conventions in fundamental areas of international law which had played a vital role in international relations. In order to select topics which met the needs of the codification and progressive development of international law and could be accepted by States, it was necessary to strengthen dialogue between Governments and the Commission. The Commission needed guidance from the Sixth Committee and the General Assembly as well. In addition to accepting the topics proposed by the Assembly or other organs of the United Nations, the Commission could select topics which it deemed appropriate from its own list and begin its preparatory work, once it had obtained the approval of the General Assembly. Some representatives stressed the point that the Commission needed to be assigned new topics by the General Assembly.

93. Regarding the three proposed future topics for possible inclusion in the future work of the Commission, namely diplomatic protection, unilateral acts of States and ownership and protection of wrecks beyond the limits of national maritime jurisdiction, some representatives expressed support for the inclusion of two topics, namely diplomatic protection and unilateral acts of States.

94. In connection with the topic of diplomatic protection, the view was expressed that it would be useful to give some consideration to the "clean hands" theory, which referred more to international responsibility than to diplomatic protection. As for the scope, it was suggested that the study should be limited initially to the protection of natural persons, so as not to waste time on issues about which there was great uncertainty. For the same reason, consideration of the special cases mentioned by the Commission (individuals in the service with the State, stateless persons and non-nationals forming a minority in a group of national claimants) should be set aside for the time being. The view was also expressed that the topic would provide a useful amendment to the rules of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

95. The view was also expressed that the Commission should begin its work on the topic with a study prepared by the Special Rapporteur for consideration by the Commission and by Governments and that decisions regarding any further work could then be made in the light of the conclusions of that study.

96. Concerning the topic of unilateral acts, some representatives considered it particularly appropriate for codification and progressive development, in view of the legal uncertainty prevailing over that subject, and that a well-defined study describing the current state of the law would therefore be of great value. Other representatives expressed doubts as to the practical implication of the Commission's work on the topic. They wondered whether such work might provide any indications as to when a State was considered bound and for what period of time. They proposed to defer consideration of the topic to a later time.

97. As regards the topic of ownership and protection of wrecks beyond the limits of national jurisdiction, opinion was divided as to its inclusion in the Commission's future programme of work. Some representatives considered the topic to be well defined and to merit inclusion in the future programme of work. Moreover, the topic had virtually been untouched by previous efforts to establish an international regime on the law of the sea, except in the case of archaeological and other historic objects. It was considered appropriate, therefore, to expand the scope of the topic to include wrecks within the limits of national maritime zones, which could also pose serious environmental problems, as in the case of State-owned vessels which sank in the territorial waters of other States. Other representatives considered the topic to be too obscure and narrow in scope. Moreover, the topic was also being studied by other bodies, such as the International Maritime Organization (IMO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). It was added that the topic should not be studied because the jurisdiction of the coastal State beyond its territorial sea and contiguous zone was guaranteed by the residual competence it had under the 1982 United Nations Convention on the Law of the Sea. In the light of these considerations, the Commission was therefore requested by these representatives to reconsider its suggestion regarding the inclusion of the topic in its programme of work.

98. Reference was also made to the environmental law topic. Some representatives wondered why the Commission had not repeated its request to be authorized to undertake a feasibility study on the rights and duties of States for the protection of the environment, while the Commission had repeated such a request in respect of the topic of diplomatic protection.

### 7. Relations with other bodies

99. In its mission of codification and progressive development of international law, some representatives expressed the view that it was necessary for the Commission to continue to follow closely developments in private international law. The risk of fragmentation in international law and practice identified by the Commission should be counteracted by cooperating more closely with bodies with a special law-making mandate, such as the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space, and institutions such as the Commission on Human Rights or the United Nations Environment Programme (UNEP). More attention should also be paid to non-governmental scholarly bodies, such as the International Law Association, and the regional consultative committees, as well as to the activities of bodies connected with the Council for Europe which were active in promoting the application of international law.

### 8. Revision of the Commission's statute

100. Some representatives endorsed the Commission's view that its statute should be revised in several respects. It was considered that while chapter I of the statute, on the organization of the Commission, had passed the test of time, chapter II, dealing with its functions, had not been followed in practice. It had been conceived on the basis of a distinction between codification and

progressive development, but the Commission had soon realized that it was impossible to have two different working methods.

101. The view was also expressed that it would be useful to revise the provisions of chapter I concerning the election of members of the Commission. While the current system did not in practice jeopardize continuity, the possibility existed that an entirely new membership could be elected every five years. It was suggested that the term of office be set at six years and that the elections be held every three years for half of the membership. The revisions might be adopted in 1999 to coincide with the Commission's fiftieth anniversary. The Commission should however be requested to submit draft revisions to the General Assembly in 1998.

102. Some representatives stated that the Commission should not use its precious time in reviewing its own statute, which could involve prolonged and potentially unfruitful discussions.

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